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ABSTRACT

The following questions are elaborated on in this speech: (1) Is the discretionary power of local boards of education being eroded? (2) If so, has some of that power been shifted upward to the state and federal legislative branches of government? (3) What is the current status of involvement of the judiciary in the making of educational decisions, particularly as related to the running of schools and the local level? and (4) Is the involvement of the judges, given the present social setting in which educational decisions are being made, out of proportion with the proposition that the three coequal divisions of government (executive, legislative, judicial) are supposed to act as a checks-and-balance system at all times? (Author/MLF)

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ARE THE COURTS DETERMINING POLICY?

M. Chester Nolte

My assignment today is to peruse the question, Are the courts determining (educational) policy? Since the answer is obviously in the affirmative, this session could be ended at once by admitting the heavy involvement of judges in the decision-making processes. The program planners, however, must have had other questions in mind to occupy our time. At the risk of being off-target, I will presume that they had in mind the following questions to elaborate on the basic question:

1. Is the discretionary power of local boards of education being eroded?

2. If so, has some of that power been shifted upward to the state and federal legislative branches of government?

3. What is the current status of involvement of the judiciary in the making of educational decisions, particularly as related to the running of schools at the local level? and

4. Is the involvement of the judges, given the present social setting in which educational decisions are being made, out of proportion with the proposition that the three co-equal divisions of government (executive, legislative, judicial) are supposed to act as a checks-and-balance system at all times?

School Board Powers Eroded

To begin: Is the discretionary power of local boards of education being eroded? The answer to this question is affirmative: local boards

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were once quite autonomous, exercising their rule-making powers in full confidence that the courts would not intervene to overthrow a decision unless it was patently ultra vires, arbitrary or capricious. Further, the board was free within reason to carry out the rule in question--to exercise its executive powers so long as it operated within its grant of power from the legislature. Should it become necessary to sit in judgment on what to do when a rule was violated, the board could convene as a quasi-judicial body to act as judge, prosecutor and jury with little concern that its findings would be thrown out by the courts. In short, local boards of education were powerful bodies, doing a vital and important state function, and within reason, they were left alone to carry out that purpose.

Beginning in the 1950's, however, it was plain that local board powers were being challenged. For one thing, local property taxes were beginning to reach confiscatory limits, and the districts were asking for additional help from the states to foot mounting bills for education. It was decided that every child should be educated up to the limits of his or her capabilities. In the peaceful Eisenhower years, this seemed not too much to expect of a country that had won a major war. Our resources seemed endless, our optimism knew no bounds. Educators asked for and got more money from the state level. When Sputnik shocked us into reality, we further improved the educational offerings in the Sixties by emphasizing quality for every child. A debate arose on whether federal moneys should be made available to local districts. Despite the warnings that with federal funds goes federal control, it was decided to mount a massive program to guarantee every child an equal educational opportunity regardless of where that child might be born. Since

federal aid was typically categorical, local districts came into compliance in order to obtain the grants, and local autonomy suffered. When a district accepted federal moneys, it agreed to certain considerations--to teach, to account for the money, to provide compensatory programs, and to come into line with Congressional policies. In effect, then, some of the choices once enjoyed by local boards shifted upward to state and federal levels of government, and local boards had less decision-making power with which to run the schools.

Then came collective bargaining. From 1961 on, local boards either by choice or by mandate agreed to bargain with teachers' groups on conditions of work, wages, and hours of employment. Since collective bargaining presupposes that opposites across the table are equals, many boards gave away the store. Only today are they vainly trying to get those prerogatives which they gave away so freely back on their side of the table. Although the courts were involved, in the absence of a state statute mandating negotiations, the courts tended to protect the board's prerogative, although not in every instance. To say that the courts made boards bargain would be stretching the facts. Out of the confusion created by bargaining with teachers, the boards emerged with singed feathers insofar as their discretionary powers to have the last word was concerned.

Sometimes we forget the further erosion of board powers by the voluntary memberships which boards have with such organizations as the state activities associations, the national accrediting agencies, such as North Central, and with the various study councils to which most larger districts belong. In the end, although theoretically these memberships are voluntary, the end result has been to further erode the final decision-making power of local boards of education. Now that these agencies are being controlled in no small way by

either the state departments of education or the courts, it seems only fair to relate that boards have suffered the loss of considerable power which they at one time exercised without outside control. If quantity was the issue in the Fifties, quality in the Sixties, then truly it must now be the Quest for power and resources which must characterize the Sobering Seventies for most local boards of education.

Centralization of Power Upward

My second question was this: If boards have lost power, has some of that power shifted upward to the state and federal legislative branches of the government? This question, too, can be answered in the affirmative. As boards asked for and got more money from both their legislature and the Congress, it was obvious that they were giving away what amounted to the right to make independent decisions apart from outside sources of that power. In effect, they became fiscally dependent branches of the hierarchy, staking their educational futures on their continuing associations with the centralized power from whence came the dollars. Part of the problem was the antiquated system by which local educational bills are paid, in practice, from the property taxes raised and spent within the local district. But mounting inflation, rising costs, a wave of post-war babies, and war-created housing shortages plagued the board, and caused it to accede to constraints which it would never have done had it been able to stand on its own two fiscal feet. Absent that prerogative, local boards continued to operate but with more and more control from above. It would seem therefore unfair to lay all this loss of power at the feed of the judiciary, even though the judges were deep into judicial activism from the Brown case on.

Present Status of Judiciary

My third question, then, is this: What is the current status of involvement of the judiciary in the making of educational decisions, particularly as related to the running of schools at the local level? Between 1953 and 1969, the Warren Court decided some three dozen education cases, more than any other court before it had handled. Prior to the Brown decision in 1954, the High Court had held to a pattern of judicial restraint, on the theory that states should be left alone in exercising their police powers of which education was but one. In 1873, the Court laid down its chief lodestar: (We reject any interpretationof the Fourteenth Amendment) which "would constitute this Court a perpetual censor upon all legislation of the states." Slaughter-House Cases, 16 Wallace 36, 1873. Again and again, the Court in the late 19th century held that "the legislatures are the exclusive judges of what is right and proper" (Munn v. People of Illinois, 94 U.S. 113, 1877), and opined that "we know that this (legislative power of the states) may be abused; but that is no argument against its existence. For protection against abuses by legislatures, the people must resort to the polls, not to the courts." (Id.)

The doctrine of non-interference had to give way, however, before the need to regulate big business. In subsequent cases (Hurtado v. People of California, 110 U.S. 516, 1884; Muller v. Oregon, 208 U.S. 412, 1908) the Supreme Court put the states on notice that "every species of State legislation, whether dealing with procedural or substantive matters," was subject to scrutiny "when the question of essential justice is raised."

Some of the cases strengthened the hand of school administrators. In 1922, for example, the Court declared that that it is within the police powers of a state "to provide by law for compulsory vaccination." Zucht v.

King, 260 U.S. 174, 1922. Hence, a citizen could assert no constitutional right to have his child attend school without the certificate of vaccination which a city ordinance required.

Beginning in the early 1920's, and perhaps influenced by the World War, the Court entered into a line of cases which amount in effect to the right of children to learn, to know, to be informed, and to pursue knowledge for knowledge's sake. In Meyer v. Nebraska, 26 U.S. 390, 1923, the Court held that a Nebraska statute convicting a teacher for teaching German language to a student was unconstitutional--an infringement of the student's Fourteenth Amendment rights. Two years later, reacting to an Oregon statute also based on intolerance exemplified by the slogan "Native, White, Protestant", the Court held that no state could interfere with the parental right to determine whether his child could be education in public schools only. The child is not the "mere creature of the State," said the Court."The State lacks the general power to standardize its children by forcing them to accept instruction from public teachers only." Other cases asserting the "child benefit" theory and released time for religious instruction followed in the 1930's and 1940's. The remark of Victor Hugo comes to mind:"Greater than the tread of mighty armies is an idea whose time has come." Thus, when the Warren Court convened in 1953, the time had come to settle once and for all three major questions related to the power of the State over its citizens: 1) Does a requirement that blacks attend separate but equal schools deprive them of their constitutional rights? 2) May the state compose and require a prayer as a condition of school attendance? and 3) May a State

demand that its teachers remain loyal to it on pain of dismissal from their jobs? It is the peculiar genius of the Constitution that these questions could all be satisfactorily handled by the Supreme Court without revolution in a peaceful and authoritative manner.

Article III of the Constitution provides for the judicial power of the United States to be vested in one Supreme Court, and in such inferior courts as the Congress shall from time to time ordain andestablish. Students of the art of government point to Article III "as the most original of all the parts of the Constitution." (Bartholomew, p. 2). "Here we have America's greatest contribution to the science of government. We have a government of laws and not of men. The lack of a judiciary was one of the prime defects of the Articles of Confederation." (Id.)

The evils which Article III protects against are the overpowering authority of the State over its subjects, a fear which was not unreal at the time the Bill of Rights was hammered out. But the Bill of Rights appllied at first only to the powers of federal government; it remained for the Fourteenth Amendment to extend this limitation to the various States as well. The colonists sought to replace an infallible king with an infallible document, and in many respects they succeeded, fortunately, beyond their fondest dreams. By setting up the judiciary as a watchdog over the rights of individuals, they succeeded in balancing the interests of the State in law andorder over against the freedoms of the individual in any point in time. Without such a provision, the freedoms of individual choice would long ago have been encroached upon, and big government would most surely have taken over the powers which our people so religiously worship as our individual prerogatives as free-born, independent citizens of the greatest nation on the face of the earth, the United States of America.

Out of Proportion?

This brings me to my fourth and final question: Is the involvement of the judges, given the present social setting in which educational decisions are being made, out of proportion with the proposition that the three -co-equal branches of government are supposed to act as checks-and-balances upon each other at all times? The key words here are "out of proportion." Are the court's powers dominating the other two branches of goverment to the detriment of individual freedoms at the expense of governmental power? I cannot say with certainty that they are.

In 1943, the Supreme Court considered the case of a school board requirement that any child who refused to salute the flag would be excluded from the public schools. West Va.St.Bd. of Educ. v. Barnette, 319 U.S. 624 1943. Writing for the majority (6-3) Mr. Justice Jackson put it this way:

> Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence? The answer in the past has been in favor of strength. But the Fourteenth Amendment, as now appliedto the States, protects the citizen against the State itself and all of its creatures, boards of education being no exception. That boards areeducating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

When we recall that in the past our English heritage of law has saddled us with a jurisprudence which values property rights over human rights in every aspect of human existence, we are reminded that as times change, the law must be dynamic and change with it. Given the imperatives inherent in the civil rights movement, we can only be thankful in theend that the Constitution permits change, and even encourages it, through the medium of the courts of justice under law. We have indeed come a long way since Blackstone wrote in all seriousness, "The man and wife are one, and that one is the husband."

Would be we far worse off as Americans if the Court had not intervened on behalf of the individual citizen? I believe it can be amply demonstrated that we would be. The Court has now taken the position as a prime defender of all democratic processes, principles, and institutions--in effect, the guardian of the national conscience in three major areas: integration and the rights of large classes of people in our society, in state criminal proceedings and the rights of prisoners, and in reapportionment of the state legislatures. The conscience is bottomed on the natural law contained in the Declaration of Independence, that all men are created equal and that each is endowed by his Creator with certain unalienable rights which cannot be taken away from him or her through governmental action.

What would it be like if the Supreme Court had not challenged Richard Nixon to turn over the tapes? What would have happened if the Court had not mandated fairness in the punishment accorded children by the State acting through its school officials? Where would we be now if church and state had been allowed to intermingle? What if the Court had not checked the professional Communist hunters in the 1950's by its close scrutiny of antisubversive legislation and loyalty oaths? And what would it be like if the Supreme Court had not appealed to our consciences to permit silent protesters to wear black armbands to show their concern about the war in Vietnam? Clearly, it would be a different world entirely.

In the end, someone or some institution must act to keep the nation on its social course, to remind us as Americans that freedom must be re-born with each passing generation, and that that government of the people, by the people, and for the people, must in the words of Abraham Lincoln, not be allowed to perish from the earth.

In the words of Clark Spurlock, a nationally recognized scholar of the effect of courts on education, "The Court has always been an arbiter of American social destiny; today it is an accelerator of that destiny. Still, contrary to frequent complaint, it has hardly become the national school board. Aside from its deep concern with personal rights and freedoms and despite the frequency of its desegregation orders, the Court remains as reluctant as ever to interfere in most matters subject to the will of state legislatures and local school boards."

I echo Spurlock's sentiments, and add only that we Americans should be thankful that the experiment which our forefathers launched in 1776 "to bring forth upon this continent a new nation, conceived in liberty, and dedicated to the propositionthat all men are created equal" should survive 200 years rather than four-score and seven. When the history of democracy is finally written, I am sure that it will contain glowing reports of that goverment that survived because it was founded on the God-given proposition that one should treat his neighbor as himself, and that in all matters between a citizen and his/her government, the rule of fundamental fairness shall prevail.

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